

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER A. BROCK)	
Claimant)	
VS.)	
)	
WICHITA SOUTHEAST KANSAS TRANSIT)	Docket No. 245,783
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the April 6, 2001, Award of Administrative Law Judge Jon L. Frobish. Claimant was granted a 5 percent permanent partial general body disability for injuries suffered on February 11, 1998, but denied a work disability award. The Board held oral argument on September 25, 2001.

APPEARANCES

Claimant appeared by his attorney, James D. Wenger of Clay Center, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric L. Lanham of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Did the Administrative Law Judge err in allowing respondent an additional 20 days to submit a brief in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury on February 11, 1998, when he was working as a truck driver for respondent. On that date, he was involved in a motor vehicle accident and taken by ambulance to the emergency room at Neosho Memorial Regional Medical Center. Claimant was treated for lacerations to his head, had glass in his ears and complained of stiffness in his neck. Claimant was referred by respondent for follow-up care with StatCare. When he first went to StatCare, he complained of back, leg and neck pain.

Claimant was terminated by the respondent on February 16, 1998, due to the motor vehicle accident. The exact reason for the termination is not contained in the record. Claimant applied for and received unemployment for a period of time and ultimately obtained a job with Fagan Leasing on July 17, 1998, as a truck driver.

Between leaving respondent and going to work for Fagan Leasing, claimant testified that he lived on a farm, limited his daily activities and was able to perform only light work. Claimant acknowledged at the preliminary hearing that he was in the process of remodeling his house, but testified that he had others do the work because he was unable to perform any heavy physical labor in his condition. He was only capable of doing, as he described it, light gardening work.

Claimant began treating with orthopedic surgeon Michael J. Johnson, M.D., on August 20, 1998, for back problems. Dr. Johnson diagnosed bilateral TMJ syndrome, neck strain and lumbar strain. Dr. Johnson continued treating claimant for several months, with the symptoms remaining roughly the same. Claimant had earlier been referred to and been treated by Eugene E. Kaufman, M.D., but Dr. Kaufman's medical reports are not contained in the record. Dr. Kaufman did, however, order a lumbar spine MRI, which Dr. Johnson had the opportunity to review. Dr. Johnson diagnosed a slight disc bulge at L5-S1 from the MRI test. Claimant was also referred for a functional capacity evaluation by Dr. Johnson. Those FCE results were available to Dr. Johnson at the time he recommended restrictions for claimant. Dr. Johnson, even though using the FCE results, acknowledged that claimant violated three of five Waddell validity testing categories, indicating less than maximum effort during the FCE. He also acknowledged that an inaccurate FCE, showing symptom magnification, might have an effect on what restrictions should be placed on a claimant.

Claimant was referred to Philip R. Mills, M.D., board certified physical medicine and rehabilitation specialist, by respondent. Dr. Mills examined claimant on January 10, 2001.

Dr. Mills diagnosed claimant with a dramatic altered gait, although the majority of the tests performed on claimant, other than producing grimacing, sighing and exaggerations of pain, were normal. Dr. Mills reviewed the MRI and, while it did reveal a bulging discopathy, he was unable to say whether this preexisted or was causally related to the accident. He was unable to explain most of claimant's symptoms based upon his physical findings. He assessed claimant a 5 percent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, utilizing DRE category level II.

Claimant obtained employment with Fagan Leasing Company on July 17, 1998. Carol Fagan, the bookkeeper of Fagan Leasing, testified to claimant's activities as a truck driver for that company. She testified that claimant had difficulties on several occasions delivering his loads in a timely fashion and ultimately was terminated on March 20, 1999, as a result of these late deliveries. She saw claimant generally two or more times a week and never noticed claimant limping. Additionally, claimant never complained to her about ongoing physical difficulties or an inability to do his job.

Respondent hired the ICU Detective Agency to investigate claimant during the workers compensation litigation. ICU Detective Daryl V. Bugner videotaped claimant on several occasions. In these videotapes, claimant is seen shoveling and raking gravel, swinging a sledgehammer which Mr. Bugner estimated weighed between 5 and 8 pounds, pulling weeds, bending at the waist repetitively, and participating in physical activities that included bending, stooping and lifting. At no time while working around his house, during the videotaping, did claimant display any type of observable limp.

However, when claimant appeared at the office of Karen Terrill, vocational rehabilitation specialist, and at a hearing before the Administrative Law Judge, claimant was videotaped displaying a noticeable limp. But, after leaving the hearing and leaving the location of Ms. Terrill's office, claimant's limp disappeared.

Claimant was referred to vocational rehabilitation specialists Karen Terrill and Monty Longacre for evaluations. The evaluation report of Mr. Longacre was provided to Dr. Johnson. After Dr. Johnson reviewed the evaluation, he concurred with Mr. Longacre that claimant had lost 85 percent of his ability to perform the tasks that he had performed in the 15-year period preceding claimant's accident with respondent. Dr. Mills was provided the reports of Mr. Longacre and Ms. Terrill. In reviewing the task lists of both experts, Dr. Mills testified that claimant's limitations would not preclude him from performing any of the job tasks listed on those reports.

In workers compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

The Administrative Law Judge found Dr. Mills' assessment that claimant had a 5 percent impairment to the body as a whole on functional basis was appropriate. As Dr. Johnson provided no opinion on functional impairment, this opinion is uncontradicted and the Appeals Board adopts same as its award of functional impairment in this matter.

Claimant's entitlement to an additional award for a permanent partial disability is controlled by K.S.A. 1997 Supp. 44-510e which states:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In considering whether claimant would be entitled to additional permanent partial disability, the Board must first consider whether claimant made a good faith effort to obtain post-injury employment. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Claimant was terminated from his employment with respondent on February 16, 1998. He obtained employment at a comparable wage with Fagan Leasing Company as a truck driver on July 17, 1998. The Appeals Board finds, between claimant's termination of employment and his employment with Fagan Leasing, he did put forth a good faith effort to find a job. It is acknowledged claimant was earning a comparable wage during the period of time he was working for Fagan Leasing. Claimant testified that, had he continued working for Fagan Leasing for an entire year, he would have earned approximately \$40,000. Based upon a 50-week year, claimant would have made \$800 per week, which is the same as claimant's average weekly wage with respondent. Even based upon a 52-week year, claimant's wage would have been at 96 percent of the wage he was earning with respondent. Therefore, under K.S.A. 1997 Supp. 44-510e, claimant would be limited to his functional impairment for this period as long as he engaged in work for wages equal to 90 percent or more of the gross average weekly wage he was earning at the time of the injury.

The dispute in this matter centers around and after claimant's termination of employment from Fagan. Claimant testified the termination resulted from his ongoing back symptoms and complaints, which limited his ability to deliver his loads in a timely fashion. However, Carol Fagan, the head bookkeeper, testified that more than sufficient time was allowed for the loads to be delivered in a timely fashion. Additionally, claimant had been counseled about his late deliveries on more than one occasion.

Finally, the Appeals Board notes that claimant's entitlement to a work disability in this matter hinges to a great deal upon claimant's own credibility. An administrative law judge generally has the opportunity to observe witness testimony in person. This allows the administrative law judge to assess the credibility of the various witnesses who have testified before him or her. In this instance, claimant testified before the Administrative Law Judge on two occasions. From the limitations placed upon claimant in the Award, the Administrative Law Judge apparently found claimant's credibility to be lacking.

In reviewing the evidence in the record and, in particular, the videotapes, the Appeals Board concurs with that finding. First, claimant testified that he limped regularly. However, the videotapes placed into evidence display claimant without a consistent limp. The only time claimant's limp appears is when he is in the vicinity of Karen Terrill's office or leaving the hearing before the Administrative Law Judge. This situational limping is highly suspicious, to say the least. Claimant further testified to being very limited in his ability to perform any type of heavy labor. Yet the videotapes display claimant shoveling and raking gravel, carrying objects, bending and stooping on a regular basis, weeding a garden, which also requires that he bend and stoop on a regular basis, and swinging a sledgehammer, which also necessitated repetitive bending.

Additionally, claimant displayed the ability to earn a comparable wage while working with Fagan Leasing. The Board finds claimant's loss of employment with Fagan stemmed from claimant's late deliveries rather than any physical limitations claimant had as a result of his injuries suffered with respondent. The Appeals Board, therefore, finds that claimant's loss of job with Fagan, as well as later efforts by claimant to obtain employment, did not constitute a good faith effort and, under the policies set forth in Copeland, a wage must be imputed. As claimant displayed the ability to earn a comparable wage with Fagan Leasing, the Appeals Board finds claimant's award should be limited to his functional impairment. Therefore, the Award of the Administrative Law Judge granting claimant a 5 percent permanent partial disability to the body as a whole should be affirmed.

Claimant objected to the Administrative Law Judge's allowing the respondent an additional 20 days to submit its brief. K.S.A. 1997 Supp. 44-523 requires that an Administrative Law Judge set terminal dates for the parties. Claimant's terminal date is usually scheduled 30 days after the first full hearing, with respondent's no later than 30 days thereafter. The statute does allow for extensions of the time limits if the Administrative Law Judge deems it appropriate upon a finding of good cause shown. In this instance, respondent's evidence was taken within its terminal date. The brief provided by respondent, while outside its terminal date, did not constitute evidence, but instead constituted respondent's legal argument to the Administrative Law Judge. K.A.R. 51-3-8(d) requires that all parties be given a reasonable opportunity to be heard. The Board acknowledges, had respondent's evidence fallen outside of the terminal date, that evidence would have been rightfully excluded by the Administrative Law Judge. In this instance, however, the Board finds the Administrative Law Judge's decision to allow respondent to

file its brief outside of its terminal date is a decision to be made by an Administrative Law Judge during the management of his docket. The Appeals Board finds the Administrative Law Judge's actions in this regard to be appropriate.

The Appeals Board finds that the Award of the Administrative Law Judge should be affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 6, 2001, Award of Administrative Law Judge Jon L. Frobish should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James D. Wenger, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director